A

CRYSTAL REALTY SDN BHD

v.

TENAGA INSURANCE (MALAYSIA) SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
MOHD GHAZALI YUSOFF JCA
KN SEGARA JCA
ABU SAMAH NORDIN JCA
[CIVIL APPEAL NO: Q-02-468-98]

C

12 DECEMBER 2007

ARBITRATION: *Award - Setting aside - Commercial motor policy - Claim for damage to insured crane - Finding of fact by arbitrator - Whether there was error of law on face of award*

D

INSURANCE: *Motor insurance - Construction of policy - Claim for damage to insured crane - Whether claimant failed to bring its case under insured perils in policy*

The arbitrator, in his final award, held that the respondent
E insurance company was not liable to the claimant/appellant under any of the terms and conditions of the commercial motor policy ('policy') taken out by the appellant in respect of an insured crane damaged on 28 January 1996. The facts, which were not in dispute, stated that the sudden swinging of the boom of the
F insured crane by the driver caused the third section of the boom to buckle, resulting in the water tank crushing onto a generator and other construction materials on the ground. The arbitrator made a finding of fact that the preventive action taken by the driver was not for the purpose of preventing any damage to the
G insured crane by accidental collision but for his own personal safety. Thus, the damage to the boom of the insured crane was not the immediate result of the insured perils under the policy. The appellant, dissatisfied with the final award, applied to the High Court to set it aside on the ground that the award was bad on
H the face of it and/or the principle therein stated as the principle of law of law – according to which the arbitrator proffered to make his award – was erroneously stated or applied. The High Court dismissed the appellant's application, resulting in the present appeal.

I

Held (dismissing the appeal)
Per KN Segara JCA delivering the judgment of the court:

(1) The arbitrator adjudged that death or injury to the appellant's employee in the course of his employment was not a risk insured against under the policy (by reason of Exception 2(ii) of Section II of the policy). The claim before the arbitrator was in respect of the damage to the insured crane. There was clearly no error of law in the above finding and statement of principle. He also held that the appellant had failed to bring its case under any of the perils set out in the policy. The final award of an arbitrator must be viewed in its totality and any error of law on the face of the award must be one that is patent and obvious as to render the award manifestly unlawful and unconscionable to subsist and, thereby, justify the award being set aside. On the facts of this instant appeal, there was no error of law on the face of the final award for the High Court to review. When an arbitrator does not accept any submission made by counsel with regard to any proposition of law, such act or conduct does not render the award infected with an error on its face. Clearly, there was no legal proposition by the arbitrator, forming the basis of the award, which was erroneous. (paras 10, 11, 12 & 13)

Bahasa Malaysia *Translation Of Headnotes*

Penimbangtara, dalam award muktamadnya, telah memutuskan bahawa syarikat insurans responden tidak bertanggungan kepada penuntut/perayu di bahawa mana-mana terma polisi motor komersial ('polisi') yang diambil oleh perayu berkaitan sebuah kren berinsurans yang mengalami kerosakan pada 28 Januari 1996. Fakta-fakta yang tidak dipertikai adalah bahawa ayunan mengejut boom oleh pemandu kren berinsurans telah menyebabkan keratan ketiga boom mengancing, sekaligus menyebabkan tangki air jatuh menghempap generator dan lain-lain bahan binaan di atas tanah. Penimbangtara telah membuat dapatan fakta bahawa tindakan pencegahan yang diambil oleh pemandu bukanlah untuk mengelakkan kemalangan dan kerosakan kepada kren berinsurans tetapi adalah untuk menyelamatkan dirinya. Ertinya, kerosakan kepada boom kren berinsurans bukanlah akibat terus dari bahaya yang diinsuranskan di bawah polisi. Tidak berpuashati, perayu merayu ke Mahkamah Tinggi untuk mengenepikan award muktamad atas alasan bahawa award tidak sah pada permukaannya dan/atau prinsip yang dinyatakan di dalamnya sebagai prinsip

A undang-undang – berasas mana penimbangtara membuat awardnya –telah dicatat atau dilaksanakan secara salah. Mahkamah Tinggi menolak permohonan perayu sekaligus membangkitkan rayuan di sini.

B **Diputuskan (menolak rayuan)**
Oleh KN Segara HMR menyampaikan penghakiman mahkamah:

(1) Penimbangtara telah memutuskan bahawa kematian atau kecederaan pekerja perayu di sewaktu menjalankan tugas-tugas C mereka bukanlah satu risiko yang diinsuranskan di bawah polisi (berdasarkan Kecualian 2(ii) bahagian II polisi). Tuntutan di hadapan penimbangtara pula adalah atas kerosakan kepada kren berinsurans. Adalah dengan itu jelas bahawa tiada D sebarang kesilapan undang-undang pada dapatan dan pernyataan prinsip tersebut. Penimbangtara juga memutuskan bahawa perayu gagal untuk membawa kesnya di bawah mana-mana bahaya yang disenaraikan di dalam polisi. Award muktamad penimbangtara harus dilihat secara menyeluruh dan E sebarang kesilapan di permukaan award hendaklah sesuatu yang patent dan ketara sehingga menjadikan award tersebut jelas tak sah dan tidak patut wujud, sekaligus mewajarkan pengenepiannya. Berdasarkan fakta rayuan di sini, tiada kesilapan pada permukaan award yang mewajarkan semakan F oleh Mahkamah Tinggi. Bilamana seorang penimbangtara tidak menerima hujah yang dibuat oleh peguam berhubung mana-mana proposisi undang-undang, tindakan atau kelakuan sedemikian itu tidak menyebabkan award dijangkiti kesilapan di permukaannya. Jelas bahawa tidak terdapat apa-apa proposisi G undang-undang yang silap yang telah dijadikan asas award oleh penimbangtara.

Case(s) referred to:
Ganda Edible Oils Sdn Bhd v. Transgrain BV [1988] 1 MLJ 428 ***(refd)***

H **Other source(s) referred to:**
Halsbury's Laws of England, 4th edn, vol 2, p 334, para 623

For the appellant - Bong Ah Loi (Zal Hll Sing Tieng with him)
For the respondent - Alvin Yong Sze Lung

I *[Appeal from High Court, Kuching; Originating Motion No: 25-18-98-III (II)]*

Reported by Suresh Nathan

JUDGMENT

KN Segara JCA:

[1] The learned Arbitrator in his final award held that the respondent herein (Tenaga Insurance (Malaysia) Sdn Bhd) was not liable to the claimant/appellant herein (Crystal Realty Sdn Bhd) under any of the terms and conditions of the Commercial Motor Policy taken out by the claimant in respect of the Tadano Crane that was damaged on 28 January 1996. The claimant, dissatisfied with the said final award, applied to the High Court to remit and or set aside the said award on the ground that "the said award is bad on the face of it and/or that the principle therein stated as principle of law according to which the said arbitrator proffered to make his award is erroneously stated or applied."

[2] It is settled law that an arbitrator's award may be set aside for an error of law on the face of it. In order to be a ground for setting aside the award, an error of law on the face of the award must be such that it can be found in the award, or in a document actually incorporated with it, or that there is some legal proposition, which is the basis of the award, is erroneous. The principles that have to be applied are very succinctly set out in *Halsbury's Laws of England*, 4th edn, vol. 2, p. 334 para. 623 "Error of law on the face of award" which was adopted and applied by his Lordship Syed Agil Barakbah in *Ganda Edible Oils Sdn Bhd v. Transgrain BV* [1988] 1 MLJ 428 at 430:

> An arbitrator's award may be set aside for error of law appearing on the face to it, though the jurisdiction is not lightly to be exercised. Since questions of law can always be dealt with by means of a special case this is one matter that can be taken into account when deciding whether the jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists at common law independently of statute. In order to be a ground for setting aside the award, an error in law on the face of the award must be such that that can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous.
>
> If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside; and where the question referred for arbitration is a question of construction, which is generally speaking, a question

A of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

[3] The learned High Court judge dismissed the claimant's application to set aside the arbitrator's award and hence this appeal before us by the claimant/appellant herein. The final award of the learned arbitrator appears from pp. 152 to 166 of the appeal record.

[4] It is very clear from the final award that the facts are not in dispute. The parties have agreed as to the circumstances of how the incident took place, which is as follows (para. 1.2.1 of the award):

(a) On 28.01.1996 the insured Nissan Tadano HT Crane bearing registration No. QKC 8951(hereinafter referred to as "the Insured Crane") and a Sumitomo Crawler Crane bearing registration No. QKG 2924 (hereinafter referred to as "Sumitomo Crawler Crane") were employed by the claimant to jointly lift a Silo/water tank weighing approximately 30 tons for positioning onto another similar tank for some engineering works.

(b) During the lowering exercise, unknown and totally unexpected by the Insured Crane driver, Bong Chit Fatt (hereinafter referred to as "Bong"), the driver of the Sumitomo Crawler Crane lowered the Silo/water tank boom at a quicker pace than the Insured Crane.

(c) As a result, the Silo/water tank swung in the direction of the Insured Crane cabin and Bong. Realising the impending danger by Bong Chit Fatt of being hit/impacted/collided into by the Silo/water tank, Bong instinctively took an evasive step by rotating the boom of the Insured Crane to the left to avoid the impact or collision by the Silo/water tank. During the process of the sudden swinging of the boom of the Insured Crane, the third section thereof became buckled which resulted in the Silo/water tank crushing onto a generator and other construction materials on the ground.

[5] Now, from the facts set out in para. (c) above, the sudden swinging of the boom of the Insured Crane by the driver, Bong, caused the third section of the boom to buckle and resulted in the Silo/water tank crushing onto a generator and other construction materials on the ground.

[6] It was not part of the agreed facts that the damage to the Insured Crane was caused by any of the perils set out in the policy under "Section I – Loss Or Damage" namely:

(a) by accidental collision or overturning or collision or overturning consequent upon mechanical breakdown upon wear and tear

(b) by fire external explosion self ignition or burglary housebreaking or theft

(c) by malicious act

(d) whilst in transit (including the processes of loading and unloading incidental to such transit by

(i) road rail inland waterway lift or elevator

(ii) direct sea route across the straits between the island of Penang and the mainland

[7] The learned arbitrator had heard the evidence of witnesses and made this very relevant and important finding of fact (para. 6.2.4 of the award):

> On the very clear admission of the crane driver, Bong Chit Fatt I find as a fact that the sudden swing or rotation of the crane was taken as the water tank silo was swinging dangerously towards him and the preventive action was taken in order to avoid the water tank silo crashing on top of him. In short, the action was taken in the face of the imminent danger to Bong Chit Fatt's own life!

[8] From the above finding of fact it is irrefutable that the preventive action taken by the driver was not for the purpose of preventing any damage to the Insured Crane by accidental collision but for his own personal safety. The damage to the boom of the Insured Crane was not the immediate result of the insured perils under the policy.

[9] For the purpose of determining the question of the respondent's liability under the Insurance Policy the parties had mutually agreed to frame the following question:

> The question to be determined by the arbitrator is whether the accident as described is covered by the Policy, in particular whether it is covered:
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> (a) By accidental collision or overturning or collision or overturning consequent upon mechanical breakdown or consequent upon wear and tear; or
>
> (b) By malicious act; or
>
> (c) By impact damage caused by falling objects; or
>
> (d) By any of the perils set out in the Policy.

[10] The learned arbitrator has considered very carefully, based on the agreed facts as well as the evidence adduced by the witnesses, whether the claimant has succeeded in bringing its case within the perils stated in the policy. In his final award he has determined that the respondent insurance company was not liable to the claimant under any of the terms and conditions of the Commercial Motor Policy KG 395TG 007887 dated 30 October 1995 relied on by the claimant. He made the following finding:

> **First**
>
> I agree that the death or injury to the employee of the claimant in the course of his employment is not a risk insured against under the policy (by reason of Exception 2(ii) of Section II of the policy) and it follows that the principle of preventive action taken in the face of imminent danger does not apply to this reference.

(Exception 2 (ii) of Section II of the policy reads:

> The company shall not be liable in respect of
>
> (ii) death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment)

[11] The claim before the arbitrator was in respect of the damage to the insured crane. There is clearly no error of law in the above finding and statement of principle.

Second

Next, I have to consider whether the claimant have succeeded in bringing their case within any of the under mentioned perils expressly relied on namely

(a) By accidental collision or overturning consequent upon mechanical breakdown or upon wear and tear; or

(b) By impact damage caused by falling objects provided no convulsion of nature is involved;

(c) By any of the perils set out in the policy.

I will deal with item (b) first.

In my view, the impact damage must have been caused by falling objects and as the damage to the third section of the 'boom' was not so caused, I find and adjudge the claim of the claimant under this head, viz item (b) therefore fails.

In *City Car Rentals & Tours Pte Ltd v. Sim Jwee Kiat* [1988] 2 MLJ 206 Thean J (as he then was) of the Singapore High Court held that 'collision' not only applicable to two moving vehicles, but could also include between a moving vehicle and a stationary boulder.

And based on the agreed facts and the evidence adduced by the witnesses in this reference the claimant have clearly failed to bring their claim under item (a) also.

On the agreed facts and the evidence produced before me in this reference I find and adjudge that there was no accidental collision or overturning of NISSAN TADANO CRANE on 28.01.1996.

I also find and adjudge that the damage to the third section of the 'boom' was due to the sudden rotation or swing of the crane to the left, a preventive action taken by the crane driver, Bong Chit Fatt, in the face of imminent danger to protect and safeguard his life.

I further hold and adjudge that Exception 2 (ii) of Section II of the Policy expressly excludes the death or injury to the employee of the claimant in the course of his employment.

And lastly, on the agreed facts and the evidence adduced before me in this reference, the claimant have failed to bring their case under (c), namely "By any of the perils set out in the Policy".

A For the above reasons I hold and adjudge that the respondent insurance company are not liable to the claimant under any of the terms and conditions of Commercial Motor Policy KG395TG007887 dated 30.10.1955 relied on by the claimant in this reference.

B I also hold and adjudge that the claim of the claimant against the respondent therefore fails.

[12] The final award of the arbitrator must be viewed in its totality and, any error of law on the face of the award must be one that is patent and obvious as to render the award manifestly C unlawful and unconscionable to subsist and, thereby justify it be set aside.

[13] In this appeal, there is no error of law on the face of the final award, for the High Court to review. When an arbitrator D does not accept any submission made by counsel with regard to any proposition of law, such act or conduct does not render the award infected with an error on its face. Clearly, there is no legal proposition by the arbitrator, forming the basis of the award, which is erroneous.

E **[14]** The appeal is unanimously dismissed with costs. Deposit towards account of taxed costs of the respondent.

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